

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BENNIE A. McELWAIN,

Petitioner,

v.

SHERRY BURT,

Respondent.

Case No. 1:05-CV-828

Hon. Richard Alan Enslen

ORDER

Petitioner Bennie A. McElwain has objected to United States Magistrate Judge Ellen S. Carmody's Report and Recommendation which recommended dismissal of Petitioner's habeas action as filed outside of the one-year limitation period of 28 U.S.C. § 2244(d)(1). Petitioner has objected to the Magistrate Judge's finding of untimeliness on the ground that the Magistrate Judge did not consider that his Petition was asserting a constitutional claim arising from the United States Supreme Court's June 2005 decision in *Halpert v. Michigan*, 125 S. Ct. 2582 (2005). This is significant because section 2244(d)(1)(C) permits delayed motions filed within one-year of such Supreme Court decision provided that the right recognized is to be applied retroactively. Western District of Michigan Local Civil Rule 72.3(b) permits a District Court Judge to recommit a matter to a Magistrate Judge for further findings. In this case, it would be useful to obtain further findings on the issue of whether Petitioner qualifies for a section 2244(d)(1)(C) extension or other extension premised on the *Halpert* violation.¹ In making such findings, the Magistrate Judge may also consider

¹Another interesting question raised by this Petition is whether a Petitioner who is prevented by unconstitutional practice of the State from filing an appeal of his criminal sentence (a *Halpert* violation) is entitled to an extension under section 2244(d)(1)(B) or an equitable extension on that basis.

other relevant matters, without limitation, including whether Petitioner has properly exhausted available state remedies as to a *Halpert* claim.

THEREFORE, IT IS HEREBY ORDERED that Petitioner's Objection (Dkt. No. 6) is **GRANTED** to the limited extent that this matter is recommitted to the Magistrate Judge for further findings consistent with this Order.

DATED in Kalamazoo, MI:
July 17, 2006

/s/ Richard Alan Enslen
RICHARD ALAN ENSLEN
SENIOR UNITED STATES DISTRICT JUDGE